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No. 707

IN THE

Supreme Court of the United States

October Term, 1962

MRS. ALBERTA GEE, ET AL., *Petitioners*

v.

STRACHAN SHIPPING COMPANY and TEXAS EMPLOYERS' INSURANCE ASSOCIATION, *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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This Brief is filed in opposition to the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. An extension of time in which to file this Brief was granted, and the time extended to and including March 1, 1963, by the Clerk of this Court by letter dated January 28, 1963.

GENERAL STATEMENT

The judgment of the Court of Appeals (Appendix B of the Petition, p. 21) affirmed, in a written opinion, Chief Judge Tuttle and Circuit Judge Jones, Circuit Judge Hutcheson dissenting, (Appendix A to Petition, pp. 13-20) the final judgment of the United States District Court for the Southern District of Texas (R. 46), holding that the Deputy Commissioner's Compensation Order-Award of Death Benefits (R. 19) was to be set aside, and, its enforcement enjoined, because it was not supported by RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE, UPON A CONSIDERATION OF THE RECORD AS A WHOLE, therefore falling within the condemnation of the Administrative Procedure Act, (5 U.S.C. 1001, et seq.).

For the Court's ready reference, since the opinion of the District Court is not appended to the Petition (although the petition states on page 1 thereof that it is appended), such is appended to this Opposition Brief as Appendix A. However, in this brief when reference is made to such opinion, citation is to the pages in the Record itself.

Further, Respondents admit this Court has jurisdiction to consider the Petition under 28 U.S.C. 1254(1), even though (Par. (B) 3, page 2) the Petition erroneously states this Court's jurisdiction is conferred by Rule 23b Supreme Court Rules, 28 U.S.C.A. 1651.

Respondents also agree that the opinion of the United States Court of Appeals for the Fifth Circuit is reported in 306 F. 2d 693, although erroneously stated in the Petition (p. 1) as being 306 Fed. Sup. 693.

STATEMENT OF THE CASE

In general, Respondents agree with the Statement of the Case as set forth in the Petition, insofar as such sets forth the chronological events from the formal order of the Deputy Commissioner to the appeal to the United States District Court for the Southern District of Texas, and the subsequent appeal to the United States Court of Appeals for the Fifth Circuit, in which briefs were presented and the case argued in behalf of Petitioners by attorneys from the Department of Justice, Washington, D. C.

However, insofar as Petitioners' Statement of the Case attempts to set forth purported facts, Respondents cannot agree to several of the statements set forth on pages 3, 4, 5 and 9 of the Petition because such are erroneous, inaccurate and unsupported by the Record before this Court. Neither are they in accord with the facts as stated in the District Court's opinion (Exhibit A hereto) or in the opinion of the Court of Appeals (Exhibit A to the Petition). These errors, inaccuracies and unsupported statements so distort the true contents of the printed Record as they appear page by page and word for word therein that this Court might be led initially into an erroneous conception as to the true facts and testimony in the Record made before the Deputy Commissioner, pertinent portions of which appear in the Record before this Court. Examples are:

PETITION	RECORD
1. p. 3 — Date of Order of District Court: "February 2, 1961,"	Date of Order (R. 46-48): "February 1, 1961"

2. p. 3 — Note 1 — "at this time Dr. Radar could hear rales over the areas of both lungs" (R. 61)	Dr. Radar observed *a few asthmatic* rales in both lungs (R. 61). (Emphasis supplied)
3. p. 3 — "a considerable amount of the fertilizer was thrown on him". (R. 52).	"and it splattered over him" (R. 52). The District Court said: "In some manner the conveyor belt 'choked up' and such fertilizer 'splattered over' Gee" (R. 34), and the Court of Appeals said: "The conveyor belt which was moving the fertilizer 'choked up' and a quantity of the fertilizer 'splattered over' Gee * * * ". (Petition, Appendix A, p. 14)
4. p. 4 — "On March 9 the decedent was examined again by Dr. Radar, who found him *somewhat improved*" (R. 62). (Emphasis supplied).	(Dr. Radar) "After the 6th I saw him on the 9th and he *was much better*" (R. 62), (Emphasis supplied) and Dr. Radar did not hear rales on either side. (R. 63). The District Court said: "By March 9th Gee was improved" (R. 35), and the Court of Appeals said: "Gee improved" (Petition, Appendix A, p. 14).
5. p. 4 — "But at the time of a further examination on March 12, Dr. Radar was unable to hear breath sounds on the left side of the chest in front * * * " (R. 63).	unable to hear breath sounds in "the front side of left lung, in the lower one-half, let's say" (R. 63).

6. p. 4 — "***and Gee reported he was feeling much worse". (R. 63).	There is no such statement in the printed Record, p. 63.
7. p. 5 — "He seemed to go downhill from the date of injury until death, Mrs. Gee, p. 57"	Mrs. Gee's testimony (Attorney Roberts): "Q. Did he seem to go downhill from the date, March 5, 1957, until he died, as far as his health was concerned? A. Yes, he just continued, seemed like, to go down. Q. Was he— A. *But for about a month he seemed like he held up pretty good for about a month.* (Emphasis ours). Q. I see. A. And that is when he was going to Park View, but when he started, he went to Dr. Jones, and when he started drawing some fluid out of him, he said, he went right down, there, he started going down, there— Q. I see. A. —in a hurry." See the District Court's comment on this testimony (R. 35, note 2).
8. p. 5 — "Dr. James C. Jones who testified on behalf of Appellants expressed the opinion that the fertilizer incident so masked the true	These remarks do not accurately reflect the overall testimony of Dr. James C. Jones (as set forth in the Record before this Court,

condition of deceased as to hasten his death by at least a few minutes, p. 121 R., and that the fertilizer aggravated his condition, p. 126 R.

pp. 118-128), the only doctor presented by Petitioners. The District Court's opinion (R.37) is enlightening when it says: "I come then to the medical testimony — claimant presenting one medical doctor and employer presenting five.

Dr. J. C. Jones testified for claimant.[4] He was of the opinion that the fertilizer incident *might possibly* have aggravated Gee's pre-existing cancerous condition, when questioned on direct examination by claimant's attorney. Dr. J. C. Jones waivered considerably in this regard on cross-examination, however.[5]

[4]It might be noticed that Dr. J. C. Jones, who described himself as a "specialist" in internal medicine, was not a diplomate of the American Board of Internal Medicine. He had been in practice one year. There was no testimony of any special training or experience in cancer techniques. He had never treated decedent, nor had any previous connection with Gee's pathology.

[5]Consider this exchange between Dr. J. C. Jones and

employer's attorney at T. 329, L. 5, et seq:

"Q. Well, now, then, when we are talking about this question of the fertilizer incident to some slight extent, I believe, is what you said, may have aggravated the cancer condition —

A. I don't know whether it was slight or otherwise

. . .

Q. Or that it just happened to arrive at the time seven days after the fertilizer incident that his symptoms became noticeable to the man; that is true, isn't it?

A. That's right."

The Court of Appeals for the Fifth Circuit had this to say about the testimony of Dr. James C. Jones: (Petition, Appendix A, p.19).

"If the whole record has within it the substantial evidence that is required to sustain the finding, that evidence must be found in the testimony of Dr. James C. Jones. He had never examined Gee and so his testimony was based upon the clinical and hospital records, upon X-rays and upon the hypotheses incorporated in the questions of counsel. The doctor expressed the opinion that the fertilizer masked Gee's true condition and delayed a diagnosis of cancer so that it progressed beyond the stage at which treatment might have been given which probably would have prolonged his life by as much as two or three months.

* * *

But this is not all that Dr. Jones said in his testimony. The prolongation of Gee's life would probably have resulted if there had been an early diagnosis of cancer. He "guessed" that the pleural effusion, which he opined was masked by the effect of the fertilizer incident, had existed for several weeks prior to the incident. On cross-examination he gave an affirmative answer to this question,

> "And the only thing that you are in a position to say now, as I understand it, is that had it not been for the fertilizer incident, there is a possibility that the cancerous condition would have been discovered at an earlier date and there is then a possibility that his life may have been prolonged possibly two or three months."

Thus that which had been a probability on direct examination became only a possibility on cross-examination. The doctor was further questioned about his opinion as to the prolonging effect of the treatment he would have given. But this was qualified and, we think, contradicted by the statement that "Well, how long they will go on and how much benefit, of course, nobody can predict."

The opinion testimony of the claimant's expert, Dr. James C. Jones, that the fertilizer hastened the death of Gee, was uncertain and contradictory. It was based upon surmise and conjecture. It was the result of piling presumption upon presumption and drawing inference from inference. We reach the conclusion that this testimony cannot be regarded as substantial evidence to support the crucial finding that the death was hastened by the fertilizer."

THE SOLE AND ONLY QUESTION PRESENTED

Is there RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE to support the Deputy Commissioner's finding that the fertilizer incident of March 5, 1957, RESULTED IN THE DECEDENT'S PERMANENT DISABILITY from March 6, 1957, to October 3, 1957, and CAUSED OR ACCELERATED HIS DEATH on October 4, 1957, FROM LUNG CANCER?

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

1. The ONLY question is whether there is RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE in the Record as a whole to support the Deputy Commissioner's fact findings. To answer such would require detailed examination of 77 pages of selected as controlling factual evidence (R. 51-128) by this Court, all in disregard of this Court's proper function and with attendant dissipation of this Court's energies with respect to the mass of important and difficult business properly before this Court.

2. This is NOT a case presenting NOVEL QUESTIONS.

3. This is NOT a case involving the settlement of PRINCIPLES important to the PUBLIC, as distinguished from the parties involved.

4. This is NOT a case involving ISSUES OF CONSTITUTIONAL DIMENSIONS.

5. This is NOT a case involving a CONFLICT with the decision of another Court of Appeals on the same matter, either specifically or generally.

6. This is NOT a case involving a decision of an IMPORTANT QUESTION OF FEDERAL LAW.

7. This is NOT a case involving a DECISION OF A FEDERAL QUESTION in a way CONFLICTING WITH DECISIONS OF THIS COURT.

8. This is NOT a case in which DEPARTURE from the ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS has been had so as to call for the EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

9. This is NOT a case involving STATUTORY CONSTRUCTION of any provision of the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, 44 Stat. 1424, Ch. 509, as amended, 33 U.S.C. 901, et seq.

ARGUMENT

The District Court and the Court of Appeals for the Fifth Circuit have not failed to apply the proper standard in their review of the Deputy Commissioner's order. Their scope of review, as well as the scope of review of this Court, is fixed by the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, Ch. 324, 5 U.S.C. Sec. 1001, et seq. The specific standard of judicial review is contained in Section 7 of that Act, 5 U.S.C. 1006, which reads in part as follows:

> "(c) * * * No sanction shall be imposed or rule or order be issued except upon consideration of the *whole record* or such portions thereof as may be cited by any party *and as supported by and in accordance with the reliable, probative, and substantial evidence.* * * * " (Emphasis supplied)

That the Deputy Commissioner's order must be measured by this standard of judicial review is expressly held in this Court in *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951), this Court saying:

> "Both sides conceded that the scope of judicial review of such findings of fact is governed by the Administrative Procedure Act. Act of June 11, 1946, 60 Stat. 237, ch. 324, 5 U.S.C. §§ 1001 et seq. The Standard, therefore, is that discussed in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, ante, 456, 71 S.Ct. 456. It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. The District Court recognized this standard."

This Court, in *Universal Camera Corp. vs. National Labor Relations Board*, 340 U. S. 474 (1951), said at pp. 487-490:

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is the clear meaning of the reference in both statutes to "the whole record." Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney

General's Committee demonstrate that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment.

" * * * Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

"There remains then the question whether enactment of these two statutes has altered the scope of review other than to require that substantiality be determined in the light of all that the relevantly presents * * * ".

" * * * The legislative history of these Acts demonstrates a purpose to impose on courts a responsibility which has not always been recognized. Of course it is a statute and not a committee report which we are interpreting. But the fair interpretation of a statute is often "the art of proliferating a purpose," Brooklyn National Corp. v. Commissioner, 157 F. (2d) 450, 451, revealed more by the demonstrable forces that produced it than by its precise phrasing. The adoption in these statutes of the judicially-constructed 'substantial evidence' test was a response to pressures for stricter and more uniform practice, not a reflection of approval of all existing practices. To find the change so elusive that it cannot be precisely defined does not

mean it may be ignored. We should fail in our duty to effectuate the will of Congress if we denied recognition to expressed Congressional disapproval of the finality accorded to Labor Board findings by some decisions of this and lower courts, or even of the atmosphere which may have favored those decisions.

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

That the District Court (R. 33, 39, 40) and the Court of Appeals understood and applied the proper standard of judicial review is clearly shown. The Court of Appeals said (Petition, Appendix A, p. 15, 17):

"The question before the District Court, as stated and decided by it, was whether there was reliable, probative, and substantial evidence in the record as a whole to support the Deputy Commissioner's finding that the 'fertilizer incident' resulted in Gee's permanent disability and caused or accelerated his death. Such is the question before us * * * ", (and at p. 17):

"the review is of the record as a whole, and the administrative order is to be sustained if it appears, upon that review, that substantial evidence support the findings. *Universal Camera Corporaion v. National Labor Relations Board*, 340 U.S. 474, 71 S. Ct. 456, 95 L.Ed. 456; *O'Leary, Deputy Commissioner, v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 71 S.Ct. 95 L.Ed, 483."

Thus Petitioners' assertion that the District Court and the Court of Appeals have applied an improper standard in reviewing the Findings of Fact of the Deputy Commissioner is simply without merit, as is the assertion that such Courts below exceed their scope of review. *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, is not to the contrary. The District Court considered *Sentilles* (a jury case involving a seaman's action for damages against his employer under the Jones Act, 46 U.S.C. 688), in which this Court followed its policy of reviewing in detail the evidence in a Jones Act case as it had done and does do in actions arising under the Federal Employers Liability Act, 35 Stat 65, as amended, 45 U.S.C. §§ 51-60. In *Sentilles* this Court held that "the proof justified with reason the conclusion of the jury that the accident occurring to *Sentilles* CAUSED his serious subsequent illness". (Emphasis supplied).

The Court of Appeals also considered *Sentilles* but correctly found that it did not effect their conclusion that "we fail to find substantial evidence of causation that must appear before the claimant can prevail" (Petition, Appendix A, p. 19). *Sentilles* is inapplicable because it did not involve a judicial review of any Administrative Agency decision governed by the statutory Administrative Procedure Act, which requires in a case such as is now before this Court on Petition for Certiorari that the award of the Deputy Commissioner must be supported by reliable, probative, and substantial evidence on the record as a whole in order for it to be sustained.

Petitioners' complaint that the District Court and Court of Appeals failed to give heed to the presumption set forth in 33 U.S.C. 920 is without merit. The Department of Justice attorneys made no such assertion before the District Court nor in the Court of Appeals. This is understandable because Section 920 has no legal significance nor application in this cause. The decisions of this Court and the numerous decisions of the Courts of Appeal and District Courts dealing with this presumption make this amply clear. *Del Vecchio v. Bowers*, 296 U. S. 280, cited by Petitioners in support of their complaint, *is in fact to the contrary*. There the question involved was whether the deceased had committed suicide and the effect, if any, to be given to the presumption in Section 920 which in substance says that it will be presumed, in the absence of substantial evidence to the contrary, that the injury was not occasioned by the willful intention of injured employee to kill himself. In *Del Vecchio* (pp. 286, 287) this Court stated emphatically the rules governing the application of such presumption, saying:

" * * * The act under consideration, however, does not leave the matter to be determined by the general principles of law, but announces its own rule, to the effect that the claimant, in the absence of substantial evidence to the contrary, shall have the benefit of the presumption of accidental death. The employer must rebut this prima facies. The statement in the act that the evidence to overcome the effect of the presumption must be substantial adds nothing to the well understood principle that a finding must be supported by evidence. Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence * * * ".

The testimony in this record by Dr. John F. Radar, Jr. (R. 58-72), of Dr. Ethel Alma Erickson (R. 74-87), of Dr. Tom R. Jones (R. 93-104), of Dr. Harry Stephen Gallager (R. 104-118), and of Dr. Jack Hermann (R. 87-93), constitutes *more than substantial evidence* that the "fertilizer incident" did not cause, aggravate, accelerate or hasten the death of decedent. Respondents do not stand alone in their view that such testimony was substantial. The Trial Court said (R. 42, 43) as follows:

" * * * The one doctor's testimony which lends any support at all to claimant was unconvincing under cross-examination. Arrayed against this scanty support for the deputy commissioner's finding was the testimony of five doctors, three of them experts in the field. It is only fair to state that the following points were made repeatedly by these five witnesses: (1) in all reasonable medical probability and based upon the

> x-rays of March 12, 1957, Matthew Gee's carcinoma of the left lung preceded by a considerable period the fertilizer incident; (2) his condition on March 5, 1957, in view of the massive pleural effusion, had progressed to an inoperable state; (3) inhalation of the fertilizer certainly did not *cause* the cancer; (4) in all reasonable medical probability inhalation of the fertilizer did not *accelerate* the cancer's growth; (5) in all reasonable medical probability inhalation of the fertilizer did not *aggravate* the cancer so as to shorten Gee's life; and (6) in all reasonable medical probability there was no connection between the fertilizer occurrence and Gee's disability and ultimate death."

And the Court of Appeals said with respect to these five medical witnesses offered by Respondents (Petition, Appendix A, p. 19):

> "The testimony of the doctors who examined Gee was all to the effect that the fertilizer episode neither caused nor aggravated Gee's cancerous condition nor caused or hastened his death".

Robinson v. Bradshaw, 206 F. 2d 435, is of no help to Petitioners for the same reason. There the United States Court of Appeals for the District of Columbia Circuit, while applying the presumption to the peculiar set of circumstances before it, makes its reason for doing so quite clear when it says (p. 439):

> "The death resulted from circumstances which the evidence indicates were directly traceable to the aggravation, in the course of employment, of an illness. There was *no substantial evidence that such aggravation was not due to the employment*, and since, also, it occurred in its course, it must be presumed to have arisen therefrom." (Emphasis supplied).

Respondents have no quarrel with the general principle asserted by Petitioners to the effect that the Longshoremen's and Harbor Workers' Act should be liberally construed in furtherance of the purpose for which it was enacted, but such cannot be applied arbitrarily to bring within the Act that which is outside of the Act, nor can such justify the awarding of benefits under the Act in the absence of *reliable, probative, and substantial evidence.* Such cannot displace the law and the legal principles applicable, and it cannot change into "facts" that which is only surmise, conjecture, suspicion and the result of piling presumption upon presumption. *Coscia v. Willard,* 257 F. 2d 105 (3 CCA, 1958), forcefully illustrates the point. There the claimant alleged an injury arising out of the course and scope of his employment and claimed compensation for permanent total disability. After an extensive hearing by the Deputy Commissioner, the claimant's claim was rejected. An appeal was made to the District Court which resulted in an order that the Deputy Commissioner's award was not in accordance with the law. On appeal to the Court of Appeals for the Second Circuit the matter was reviewed extensively and it was held that the Deputy Commissioner's findings and order denying compensation were substantially supported by the record considered as a whole. The Court of Appeals then said the following (p. 108):

> "In view of the humanitarian purpose of the Longshoremen's and Harbor Workers' Compensation Act, in Coscia's present physical condition this conclusion has not been easily reached. *But if the integrity of the administrative process is to be preserved in this case, the Deputy Commissioner's order must be upheld.*" (Emphasis supplied)

This Court expressed the same thought in *Pillsbury v. United Engineering Company*, 342 U.S. 197, 200, when it said:

> "We are aware that this is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all."

This Court there held that notice of injury had to be given within one year from the date of injury rather than one year from the date disability began.

Respondents assert that there can be no dispute that the burden of establishing a causal relation between the minor fertilizer incident of March 5, 1957, and the disability of the deceased extending to October 3, 1957, and the causal relation between the minor fertilizer incident and the death of Matthew Gee on October 4, 1957, rested squarely on the shoulders of the claimant in the hearing before the Deputy Commissioner. This burden of establishing such causal relationship made it incumbent upon the claimant to establish such by RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE and not mere guess, speculation, conjecture or suspicion. This rule has been stated in various ways by many Circuit Courts of Appeals and by this Court. Detailed citations and extensive excerpts would unduly burden this Court but an example is *Gooding v. Willard*, 209 F. 2d 913, 916 (1954), where the Court of Appeals for the Second Circuit stated:

"* * * it should also be noted that the burden to show that the accident was a contributing cause of the death was on the appellee (the claimant). It is obvious, of course, that in point of fact it either was or was not a contributing cause. However, in point of proof of causal connection, the conclusion of the trial judge that the finding of no causal connection was inadequately supported by the evidence leaves the appellee's burden undischarged." (Insert ours).

That Court also said with respect to "substantial evidence", in the light of *Universal Camera Corporation*, supra, as follows:

"As is pointed out in the opinion in the last mentioned case, 'substantial evidence' means more than evidence which, considered by itself alone, would be sufficiently persuasive to induce the trier of fact to give it the credence and weight essential to support findings. It must have those characteristics to such an extent that in the setting made by the entire record the trier may reasonably find in accordance with it after giving due consideration to whatever else is shown both in opposition or in accord. Judicial review has been extended by the Administrative Procedure Act to embrace adequate exploration of the record as a whole to enable the reviewing Court to arrive at its own judgment in determining that."

In this case the Court of Appeals for the Fifth Circuit said: (Petition, Appendix A, p. 19)

"We fail to find substantial evidence of causation that must appear before the claimant can prevail."

CONCLUSION

Respondents respectfully submit that for each and all of the reasons heretofore stated, the Petition for Writ of Certiorari to the United States Court of Appeals for the Fiftl. Circuit should be denied. This Court's statement in the *Universal Camera Corporation* case, *supra*, (pp. 490, 491), is appropriate here:

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

There is no misapprehension or gross misapplication of the "standard" in this case.

That this Court in the past has followed the above admonition is shown by the recorded decisions of this Court since *O'Leary v. Brown-Pacific-Maxon, supra,* in 1951. Insofar as a research of the decisions of this Court discloses to Respondents, there has only been *five occasions* in which this Court had before it for decision a question involving solely the Longshoremen's and Harbor Workers' Act. (In our search of the decisions of this Court, Respondents have eliminated those decisions involving the question of whether, in a specific instance, the injured party was a "seaman", and those involving specific instances in which the question was whether the injured worker was covered by the Longshoremen's and Harbor Workers' Act rather than the particular State Workmen's

Compensation Act). On each of these occasions the Court made an interpretation of or construed a specific provision of the Act. These instances have been:

1. *Pillsbury v. United Engineering Company*, 342 U.S. 197 (1952), [33 U.S.C. § 913 (a)—Whether the one year period in which to file a claim for compensation begins with the date of injury or the date when disability actually begins].
2. *Voris v. Eikel*, 346 U.S. 328 (1953), [§ 912 (a) (b) (d)—Interpreting the notice of injury provisions of the Act].
3. *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366, (1953) [Holding that a death which resulted from injuries sustained on a barge located on a marine railway on navigable waters was within the provision of the Act allowing compensation for death occurring "from injury upon the navigable waters of the United States (including a drydock)".]
4. *Thompson v. Lawson*, 347 U.S. 334 (1954), [§ 902 (16)—involving an interpretation of who is a "widow" of a deceased, so as to be entitled to death benefits provided by the Act].
5. *Czaplicki v. "SS HOEGH SILVERCLOUD"*, 351 U.S. 525 (1956), [§ 933 (b) and (i)—holding that under certain limitations therein stated an injured longshoreman was not prevented from filing a damage suit against a vessel even though he had accepted compensation under an award of the Deputy Commissioner.]

No reason exists for this Court to make this case the *sixth occasion.*

Evidently the United States Attorney for the Southern District of Texas and the attorneys of the Department of Justice who represented Deputy Commissioner Calbeck in the United States District Court, and who appealed, briefed and argued this case in the United States Court of Appeals for the Fifth Circuit were of the same view, for they declined to file a Petition for Writ of Certiorari in this Court. (Application by Petitioners for extension of time in which to file Petition for Writ of Certiorari on file with the Clerk of this Court).

WHEREFORE, Respondents pray that the Petition for Writ of Certiorari be denied.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari has been served on the Honorable W. Arthur Combs and W. Jiles Roberts, Attorneys for Petitioners, by mailing same to each of them first class postage prepaid, properly addressed to each of them at their respective office addresses, State National Building, Houston 2, Texas, and 617 Americana Building, Houston 2, Texas and that two copies of the same have been served upon the Solicitor General, Department of Justice, Washington 25, D.C., by addressing the same to him at his office and mailing same airmail postage prepaid and two copies of same have been served on the Honorable Woodrow Seals, United States Attorney for the Southern District of Texas at his office in Houston, Texas, by mailing same first class United States mail, postage prepaid, and two copies of same have been served upon the Honorable W. Harold Bigham, Department of Justice, Washington 25, D.C., by mailing same air mail, postage prepaid, all on this the 27th day of February, 1963.

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APPENDIX A

IN THE

United States District Court

For The Southern District of Texas
Houston Division

STRACHAN SHIPPING COMPANY, ET AL.

vs.

C. D. CALBECK, DEPUTY COMMISSIONER, ET AL.

C. A. NO. 12,315

MEMORANDUM OPINION

Royston, Rayzor & Cook (C. A. Brown and E. D. Vickery), of Houston, Texas; for plaintiffs.

William B. Butler, United States Attorney, and Jack Shepherd, Assistant United States Attorney, of Houston, Texas; and Harold C. Nystrom, Acting Solicitor of Labor, and Herbert P. Miller, Assistant Solicitor, U. S. Department of Labor, Washington, D. C.; for defendant C. D. Calbeck.

W. Jiles Roberts, of Houston, Texas; for claimant.

January 18, 1961

Strachan Shipping Company (hereinafter "employer") and their insurer, Texas Employers' Insurace Association,

seek to have the court review and set aside as not in accordance with law a compensation order filed by Deputy Commissioner Calbeck (hereinafter "commissioner") on August 19, 1958, pursuant to the provisions of the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C.A. Sec. 901, et seq. In the disputed order the commissioner awarded compensation to the widow and minor children of Matthew Gee, who died on October 4, 1957, allegedly as the result of an accidental injury which he sustained while working for employer. This court has jurisdiction by virtue of 33 U.S.C.A. Sec. 921(b).

This action presents a single issue for decision: Is there reliable, probative, and substantial evidence in the record as a whole to support the commissioner's finding that the fertilizer incident of March 5, 1957 (to be developed fully hereinafter), resulted in decedent Gee's being wholly disabled from March 6, 1957, to October 3, 1957, and caused or accelerated his death on October 4, 1957, from lung cancer?

It is settled that the standards of review of an award under this act are fixed by the Administrative Procedure Act, 5 U.S.C.A. Sec. 1009. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951). Section 1009(e) provides:

> "It (the reviewing court) shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by *substantial evidence* . . . In making the foregoing determinations the court shall review the *whole record* . . ." (Emphasis supplied).

The following findings of the commissioner are attacked by the employer as being unsupported by substantial evidence on this record as a whole:

"(That Matthew Gee) sustained personal injury on March 5, 1957, that resulted in his death on October 4, 1957. . . .

"*The employee's death was the result of the natural and unavoidable progression of the injury and the conditions and the ailments that were proximately caused, aggravated or accelerated by the employment.* The injury and death arose out of and in the course of the employment. The chain of causation proceeded in a logical and orderly fashion and was direct and continuous from the date of injury to and including the day of death.

"As a result of the injury the employee was under medical treatment and was wholly disabled from March 6, 1957, to October 3, 1957 . . ." (Emphasis supplied).

Inasmuch as the sole question presented is an evidentiary one it will be necessary to present a somewhat lengthy, detailed factual account. The transcript of the hearing before the commissioner is lengthy, involves complicated medical issues, and contains the testimony of six medical doctors.

Matthew Gee, deceased employee of plaintiffs, was assisting in loading a barge with triple superphosphate fertilizer at Port Adams, Houston, Texas, on March 5, 1957. In some manner the conveyor belt "choked up" and such fertilizer "splattered over" Gee. (T. 13, L. 15, et seq.). The deceased said he "was all choked up in his chest". (T. 14 to 15). Up until this incident Gee appeared to be in good health. (T. 15, 30). Claimant, Alberta Gee, widow of decedent Matthew, stated that when decedent came home from work on that day he

complained about his chest. (T. 52, L. 18; T. 53, L. 3).[1] Decedent was seen and treated by Dr. J. F. Rader on March 6, 1957. Dr. Rader took a history from Gee in which Gee said that the fertilizer got into his chest, made his chest, eyes, and nose hurt, and also created breathing difficulties. (T. 73, L. 9-13). Gee was spitting up a little fertilizer dust; his throat was sore. (T. 75, L. 1, 17).

Dr. Rader diagnosed Gee's condition upon the examination of March 6, 1957, as allergic bronchitis. Antibiotics were prescribed and applied in the ensuing days. By March 9th Gee was improved. However, on March 12th, Gee felt much worse. An x-ray of his chest made on that date by Dr. Rader showed a massive pleural effusion in the left lung. (T. 76-80). Gee was admitted to a hospital on that same day; he remained in this hospital until April 6, 1957. During the period of confinement he was comfortable and was given combination of antibiotics.[2] Hospital records show decedent was given passes to leave the hospital and even a weekend pass just prior to discharge.

Dr. T. R. Jones saw him in May 1957. X-rays revealed the continued presence of a massive pleural effusion. Dr. Jones was of the opinion that Gee had either tuberculosis

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[1] Deputy Commissioner Calbeck specifically found as a fact the following: "In consequence thereof (the injury) he had burning of chest, nose and throat . . ." The record is devoid of support for this finding. Claimant's attorney alluded to such "burning" at the hearing, and he was promptly corrected as to the matter by insurer's counsel.

[2] Claimant Alberta Gee declared "But for about a month (period of confinement) he seemed like he held up pretty good. . ." (T. 53, L. 25). Cf. the commissioner's finding of a steady erosion of decedent's position after March 5, 1957.

or carcinoma of the lung. Studies for cancer cells were fruitless. Dr. Jones felt an operation useless, being convinced Gee had inoperable carcinoma. (T. 225, L. 4, et seq.) During August and September of 1957 decedent was in and out of the hospital. A definite diagnosis of carcinoma of the lung was made. Gee died on October 4, 1957.

An autopsy was performed by Dr. Erickson, an experienced and skilled pathologist. She testified that Gee had a carcinoma of the left lung. It had spread to all of the mediastinal and regional lymph nodes. It had gone to the heart, right lung, ribs, diaphragm, right kidney, and left adrenal gland. (T. 170, et seq.) Although admittedly incapable of giving a *precise* estimate, Dr. Erickson was of the opinion that in all reasonble medical *probability* the carcinoma had far ante-dated the fertilizer incident of March 1957. (T. 175, L. 24; 176, L. 1-14; 177, L. 21; 178, L. 10; 179, L. 1, et seq.).

With these basic facts in mind I turn to the testimony adduced before the commissioner in a hearing of July 1958. The only testimony in the record aside from medical witnesses came from two co-workers of Gee, who witnessed the fertilizer incident, and claimant Alberta Gee. In the main their testimony has been discussed, supra. A fair summary of lay testimony leads to these conclusions: (1) it was windy on March 5, 1957, and the conveyor belt with the fertilizer slipped; (2) all workers were subjected to the fertilizer to some extent, but Gee inhaled or swallowed a good bit more than the rest; (3) during the next few days Gee coughed and was choked up rather noticeably; (4) Gee had had no previous discomfiture of this order; and (5) decedent seemed improved fairly

shortly. Decedent's wife felt he went downhill continually after March 5, 1957.[3]

I come then to the medical testimony—claimant presenting one medical doctor and employer presenting five. Dr. J. C. Jones testified for claimant.[4] He was of the opinion that the fertilizer incident *might possibly* have aggravated Gee's pre-existing cancerous condition, when questioned on direct examination by claimant's attorney. Dr. J. C. Jones wavered considerably in this regard on cross-examination, however.[5] At any rate this was the only testimony—lay or medical—that found a link between the fertilizer incident of March 1957 and Gee's subsequent disability and death in October 1957.

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[3] Alberta Gee testified as follows in T. 53, L. 21, et seq.:

"Q. Did he seem to go downhill from the date, March 5, 1957, until he died, as far as his health was concerned?

A. Yes, he just continued, seemed like, to go down.

Q. Was he—

A. **But for about a month he seemed like he held up pretty good for about a month."** (Emphasized portion deals with month immediately after March 5th).

[4] It might be noticed that Dr. J. C. Jones, who described himself as a "specialist" in internal medicine, was not a diplomate of the American Board of Internal Medicine. He had been in practice one year. There was no testimony of any special training or experience in cancer-techniques. He had never treated decedent, nor had any previous connection with Gee's pathology.

[5] Consider this exchange between Dr. J. C. Jones and employer's attorney at T. 329, L. 5, et seq.:

"Q. Well, now, then, when we are talking about this question of the fertilizer incident to some slight extent, I believe [illegible] that you said, may have aggravated the cancer condition—

A. I don't know whether it was slight or otherwise.

Q. Or that it just happened to arrive at the time seven days after the fertilizer incident that his symptoms became noticeable to the man; that is true, isn't it?

A. That's right.

On the other side, Dr. T. R. Jones, a specialist in lung diseases and a diplomate of the American College of Chest Physicians, examined Gee in May 1957 at the request of Dr. Rader. He felt that decedent had inoperable carcinoma of the lung. He testified that an operation might well have worsened matters. His testimony was clear on the existence of the malignancy prior to March 5, 1957. Having regard to uncertainties of cancer's growth and origin, he still felt it reasonably probable that there was no connection between the fertilizer episode and Gee's ensuing disability and demise. (T. 229, L. 23, et seq.) He doubted that aggravation occurred, unlike claimant's expert.[6]

Dr. E. A. Erickson, pathologist at the hospital where Gee died, had performed 350 autopsies on victims of lung cancer. As a result of her autopsy she doubted there was any connection between the fertilizer incident and Gee's later difficulties.[7] In answer to a question by claimant's

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[6] The crucial series of questions to Dr. T. R. Jones are in T. 229, L. 23, et seq.:

"Q. Now, then, do you think this fertilizer incident in any way aggravated the cancerous condition in his lung?

A. No, I don't think the fertilizer had anything to do with the cancer. . . I mean, I think the cancer is going to kill the man and these incidental things that happen along, I don't think they have any bearing on the final outcome of his condition."

[7] The key exchange is in T. 178, L. 22, et seq.:

"Q. . . .(C)an you tell us whether or not in your opinion, there is any relationship at all between the fertilizer incident. . . and this man's death. . .?

A. In my opinion, I do not believe there is any connection with the fertilizer incident and the onset of his disease and the progression of his disease. . . .

Q. Now, then, will you tell us whether or not in your opinion this fertilizer incident in any way aggravated the cancer?

A. I doubt it very much. It sounds most unlikely."

attorney which was, "Can we exclude this fertilizer incident as hastening this man's death by at least a few minutes?", Dr. Erickson replied, "I think we can exclude the fertilizer incident." (T. 194, L. 21).

Dr. H. S. Gallagher, pathologist connected with the M. D. Anderson Cancer Hospital in Houston and the University of Texas Post-Graduate School of Medicine, shared Dr. Erickson's view. Medical probabilities, in his opinion, made most tenuous any connection between the fertilizer event and later happenings to Gee.[8] The comparatively minor nature of the fertilizer accident is reemphasized throughout the testimony of Dr. Rader, who first examined Gee. (See T. 71, et seq.). Dr. J. Herrmann shared his colleagues' views.[9]

The applicable standard of review—substantial evidence on the record as a whole—received its outstanding interpretation in Universal Camera Corp. v. N.L.R.B., 340 U.S.

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[8] Dr. Gallagher testified in T. 267, L. 5, et seq., as follows:

"Q. Now, then, still bearing in mind the fertilizer incident of March 5, 1957, and the fact that this man died almost seven months to the day later on October 4, 1957, would you tell us whether or not in your opinion the fertilizer incident in any way hastened this man's death or brought it on any sooner than it otherwise would have occurred?

A. I do not believe that it did."

[9] Dr. Herrmann declared his opinion of causation as follows in T. 211, L. 16, et seq.:

"Q. Let me ask you, Dr. Herrmann, do you think that the fertilizer incident in March, 1957, as related to you by Mr. Gee in any way hastened his death?

A. No, I don't. I think if I may say so, I think it's almost unfortunate that the incident didn't happen sooner, so that, if it did cause a bit of respiratory embarrassment, that he would have been seen at an earlier date when perhaps his tumor would have been resectable."

474 (1951). The court made clear it was no longer permissible to consider simply that evidence which supported the administrator, but that the entire record must be examined and due appraisal made of proof which detracted from the weight of the evidence in support of the controverted order. A court was to set aside an administrative decision which it could not conscientiously find supported by substantial evidence. Reviewing courts were not to abdicate the conventional function if the judiciary in an excess of accommodation to administrative expertise. The standard enunciated in Universal Camera and in the Administrative Procedure Act was designed to thwart the practice of some administrators and agencies of relying upon surmise, suspicion, and incredible evidence. An award against an employer, precisely and simply because he was an employer, was no longer to be tolerated.

The companion case of O'Leary v. Brown-Pacific-Maxon, supra, is fraught with meaning for our function under the Longshoremen's and Harbor Workers' Act. It made clear that Universal Camera doctrine was applicable to this maritime compensation statute. It also demonstrates that even under the principles of review set forth in Universal Camera a wide latitude must be accorded the findings of the deputy commissioner. We are not permitted to weigh the preponderance of the evidence. That the reviewing court might have reached a different result than the administrator is quite immaterial if the deputy commissioner's findings have the support of substantial evidence. In cases of closely conflicting inferences, the administrator's are to prevail. If doubt exists as to whether the findings of the deputy commissioner are supported, that doubt must be resolved in his favor. Southern Steve-

doring Co. v. Voris, 190 Fed. (2d) 275 (5th Cir. 1951). Delta Stevedoring Co. v. Henderson, 168 Fed. (2d) 872 (5th Cir. 1948). In short, while the reviewing court must not remain mute in the face of a baseless award of compensation, it must not usurp the administrative fact-finding process. The district courts are without power to conduct "de novo" reviews.

The parties agree in the main to these ground rules for this dispute. They differ to some degree over the respect the deputy commissioner must accord medical testimony in a case like the present one, where the basic issues are complicated medical ones. The employer argues that the questions involved here are medical questions, which an inexperienced layman, such as the deputy commissioner, could not answer from his own experience. It is the employer's view that the deputy commissioner could not, on these technical cancer inquiries, lay claim to a prescience that would permit him to pierce the veil of scientific knowledge—even by seizing the familiar, much-vaunted shiboleth of expertise. The government, on behalf of the deputy commissioner, argues that medical opinion testimony is only advisory and is not conclusive upon the trier of fact. Where the cause of disabling condition is shrouded in doubt as in the case of cancer, says the government, the trier of fact may form his independent conclusion from all the testimony and the surrounding evidence. I am inclined to agree with the deputy commissioner in this regard. The government's position would appear to be supported by Hampton Roads Stevedoring Corp. v. O'Hearne, 184 Fed. (2d) 76 (4th Cir. 1950), and Crescent Wharf & Warehouse Co. v. Cyr, 200 Fed. (2d) 633 (9th Cir. 1952). In rejecting employer's contention

that the deputy commissioner is in any rigid, mechanical sense "bound" by medical testimony, I am not saying that such testimony can be airily disregarded on complicated medical issues. Indeed, awards based on wholly incredible lay testimony or pre-conceived, rigid economic views can never stand. I merely state that medical testimony must be balanced along with the rest of the evidence in applying the substantial evidence rule of review.

After careful consideration of the hearing record, paying heed to the liberal construction called for in remedial legislation, the court is compelled to hold that the deputy commissioner's award is simply not supported by substantial evidence in the record as a whole. Claimant has the burden of establishing a causal relation between the minor fertilizer incident of March 5, 1957, and the disability of the deceased extending to October 3, 1957, and the causal relation between that incident and the death of Gee on October 4, 1957. To carry such burden there must have been as much evidence in the record as would have justified submission of the case to a jury of laymen upon a jury trial. The Supreme Court expressly so held in Universal Camera, 340 U.S. 474, 95 L. Ed. 456 at p. 462. I am constrained to find claimant failed to show anything other than that the cancer was merely contemporaneous or a coincident following the relatively unimportant fertilizer incident. The lay testimony lends no support to have causation theory. They inform only that decedent had a soreness of throat and chest and coughing following inhalation of the fertilizer dust. Application of antibiotics apparently remedied these symptoms. The one doctor's testimony which lends any support at all to claimant was unconvincing under cross-examination. Arrayed

against this scanty support for the deputy commissioner's finding was the testimony of five doctors, three of them experts in the field. It is only fair to state that the following points were made repeatedly by these five witnesses: (1) in all reasonable medical probability and based upon the x-rays of March 12, 1957, Matthew Gee's carcinoma of the left lung preceded by a considerable period the fertilizer incident; (2) his condition on March 5, 1957, in view of the massive pleural effusion, had progressed to an inoperable state; (3) inhalation of the fertilizer certainly did not *cause* the cancer; (4) in all reasonable medical probability inhalation of the fertilizer did not *accelerate* the cancer's growth; (5) in all reasonable medical probability inhalation of the fertilizer did not *aggravate* the cancer so as to shorten Gee's life; and (6) in all reasonable medical probability there was no connection between the fertilizer occurrence and Gee's disability and ultimate death.

I have prefaced the conclusions of the doctors with "in all reasonable medical probability". In the present state of medical learning upon carcinoma, positive, unequivocal statements would be foolhardy. Claimant has proved her case only in the sense that an extremely remote causative agent *might possibly* cause, accelerate, or aggravate cancer. So long as cancer remains mysterious, anyone in claimant's position could doubtless secure medical testimony that it is "possible" that the malady is gotten from a variety of causes, always selecting, of course, that possibility holding out the greatest promise of recovery from some responsible defendant. Such a "possibilities" doctrine might ultimately overturn even the burden of proof here. If a cause is possible, says claimant, let the

employer prove the disease was caused by another agency. A recent New York case, dealing with strikingly similar facts, properly stated, "The law does not intend that the less that is known about a disease the greater shall be the opportunity of recovery in court." Miller v. National Cabinet Co., 168 N.E. (2d) 811 (1960).

Necessarily, cases involving the substantiality of evidence depend entirely upon the peculiar facts of each case. Citation of authority is obviously less helpful in this type of situation than in normal cases. A few pertinent authorities deserve brief attention, however. In Colonna's Shipyard v. O'Hearne, 200 Fed. (2d) 220 (4th Cir. 1952), the question involved was whether a causal relation existed between an injury to claimant's ankle on October 31, 1951, and the amputation of his leg on December 7, 1951. The deputy commissioner found that the amputation of the leg was caused by and flowed from the injury which he had sustained to his ankle in the course of his employment. There was lay testimony similar to that at bar. However, there was medical evidence that there was a *possibility* that a small local trauma, such as occurred to claimant, might cause a clot resulting in amputation. There was strong testimony from three other doctors to the contrary. The court held that the greatly outweighed medical testimony could not stand, and the deputy commissioner's award was enjoined. The analogies between Colonna's Shipyard and the instant case seem evident. Jacoby v. Texas Employers' Ins. Assoc., 318 S.W. (2d) 921 (Ct. Civ. Apps. 1958), a Texas Workmen's compensation decision, deals with an analogous cancer causation problem, and upon similar evidence, compensation is denied. The text in 2 Larson's Workmen's Compensation Law, Sec. 79.54, p. 303,

is pertinent. The conclusions expressed therein lend support to my rejection of this award. Claimant places much stress on Sentilles v. Inter-Caribbean Corp., 361 U.S. 107 (1959). That case, however, did not involve judicial review of an agency award governed by the standards of the Administrative Procedure Act. Sentilles is inapposite, for it was not a compensation case and concerned jury action. The parties cited numerous cases in a series of lengthy briefs. To canvass this mass of authorities would unduly lengthen this opinion without commensurate reward. The authorities have been examined; they impose no obstacle to this result.

The award of the deputy commissioner will be enjoined and set aside. The clerk will notify counsel to draft and submit judgment accordingly.

JOE INGRAHAM
United States District Judge